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Firms Push for Protection Over Preserving Documents

*Companies Say Inconsistent Federal Law Forces Them to Hoard Files and Email*

By [JOE PALAZZOLO](#)

At Exxon Mobil Corp., more than 5,000 U.S. employees are under orders not to delete a single file from their computers and devices. [Microsoft](#) Corp. employees, hundreds of them, are sitting on millions of old emails, work documents and instant messages.

The companies have become hoarders over the past decade, their lawyers say, because a patchwork of judicial decisions has made the companies overcautious about their duties to preserve data when they anticipate litigation.

Exxon and [Microsoft](#) are part a group pressing the federal judiciary to insulate companies from being sanctioned for inadvertently destroying potential evidence in civil cases. With a new, uniform rule, the companies say they could hang on to less and direct the savings into their businesses.

Plaintiffs' lawyers say such a rule would send a message that companies can play fast and loose with their obligation to hold on to information when they see a lawsuit coming.

"It will impede the search for truth," civil-rights lawyer Jennifer Klar said at a recent hearing in Washington on the proposed federal rule.

Companies are permitted to purge files routinely for business purposes. The duty to preserve files under federal law kicks in when a party "reasonably anticipates" litigation. A common trigger is a letter from an attorney demanding restitution on behalf of a client.

In four of the 13 federal circuits, judges have ruled that a party can be sanctioned for destroying or losing evidence unintentionally, says Kenneth J. Withers, deputy executive director of the Sedona Conference, a research institute focusing on antitrust and intellectual-property law. In others, he says, courts require a showing that a party destroyed evidence on purpose.

"So we've got these different standards, and the lawyers say, 'We're just going to preserve everything,' " Mr. Withers says.

The Judicial Conference, the federal judiciary's policy-making arm, is considering a rule that would limit sanctions to parties that destroy evidence "willfully or in bad faith." Ultimately, the U.S. Supreme Court would have the final say on whether to adopt the conference's suggestion.

William H.J. Hubbard, a University of Chicago law professor, has been studying the costs of document preservation. In a survey of about 15 large companies, he found that in most lawsuits, 10 to 20 employees were required to preserve their files. But in a small number of cases, hundreds, or even thousands, of employees were under such instructions, he says. "When you add up the costs, it ends up being a pretty large sum of money that's being diverted from business purposes," he says.

At Exxon Mobil, 5,200 current and former employees are under orders to preserve data, says Robert L. Levy, an in-house counsel with the company. He estimates that employees of the oil company collectively spend more than 200,000 hours a year making sure they are abiding by such orders. "We are spending tens of millions of dollars a year just in employee time," Mr. Levy says.

Litigation against big corporations is relatively common and often doesn't result in significant liability.

Nevertheless, at Microsoft the amount of data preserved on average by a single employee has jumped to more than 30 gigabytes today from around 17 gigabytes two years ago, says Assistant General Counsel Jon Palmer. The software company stores an average of 60 million pages in each case, he says. An average of 88 pages makes it into court.

"Everyone is building these enormous haystacks on the off chance that we may find a few needles," Mr. Palmer says.

Dan Troy, general counsel for GlaxoSmithKline PLC, said at a recent hearing that 45% of the Britain-based pharmaceutical company's U.S. employees are subject to at least one preservation notice. The U.S. business has socked away more than half its company email, 203 terabytes of information, or about 20 times the printed collection of the Library of

Congress, he said.

Sanctions for destroying evidence are rare, legal experts say.

A Microsoft spokesman says the company has never been sanctioned for destroying evidence. Exxon Mobil received a mild reprimand in a 2009 case for failing to preserve faxes, according to court records. The presiding judge allowed the opposing party to cross-examine an Exxon witness about the missing documents.

A more serious sanction—one that companies dread—is an adverse-inference instruction. That is when a judge tells a jury that a party destroyed evidence and that jurors can assume that the destroyed evidence would have hurt that party's case.

"It's not completely fatal, but generally once a jury hears that, that's typically the end of it," says Mr. Withers, of the Sedona Conference.

Corporate lawyers say plaintiffs' attorneys have used the threat of sanctions and the explosion of data to their advantage. Plaintiffs' lawyers sometimes abuse the evidence-exchanging phase of litigation, known as discovery, by making broad requests that cost millions of dollars to fulfill, companies say.

Corporate lawyers say their clients in many cases would rather settle than spend the time and money to dig through millions of electronic files.

Plaintiffs' lawyers point out that federal rules already allow companies to destroy data in the course of normal business. "You don't have to preserve anything that you don't have a legal obligation to preserve," says Ms. Klar, the civil-rights lawyer. "What the companies are essentially saying is, 'You may behave negligently and not be punished.' "

**Write to** Joe Palazzolo at [joe.palazzolo@wsj.com](mailto:joe.palazzolo@wsj.com)  
<http://m.us.wsj.com/articles/SB10001424052702304607104579214322182549600>